No. 02-207 (2)

Supreme Court, U.S.
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In the Supreme Court of the United States

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES INC., SAN DIEGO GAS AND ELECTRIC COMPANY, INTERNATIONAL PAPER COMPANY, CHAMPION INTERNATIONAL CORPORATION, WESTVACO CORPORATION, AND WEYERHAUSER COMPANY,

Petitioners,

v.

CHEVRON U.S.A. INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Federal Circuit required to write an opinion citable as precedent in affirming the judgment of the district court?

2. Did the Federal Circuit err in following precedent of the Temporary Emergency Court of Appeals ("TECA") that holds that only direct purchasers have standing to sue under § 210 of the Economic Stabilization Act ("ESA")[1] and that determines not to expand the statute while exercising jurisdiction under the savings clause?

3. Did the Federal Circuit err in following TECA precedent that applies the most closely analogous state law statute of limitations to actions brought under § 210 of the ESA?

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[1] Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

CORPORATE DISCLOSURE STATEMENT

The parent corporations of respondent Chevron U.S.A. Inc., a corporation, are Texaco Exploration and Production Inc. and Texaco Inc., neither of which is a publicly held company. Texaco Inc. indirectly owns 100 percent of the stock of Texaco Exploration and Production Inc. Texaco Inc. in turn is indirectly wholly owned by ChevronTexaco Corporation, a publicly held corporation.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Chevron U.S.A. Inc. ("Chevron") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Federal Circuit's decision in that court's docket No. 01-1565 on April 5, 2002.

STATEMENT OF THE CASE

The decision of the Court of Appeals affirms the district court's dismissal of petitioners' complaint against Chevron. The complaint sought damages from Chevron based on alleged overcharges in the price of crude oil under § 210 of the Economic Stabilization Act ("ESA").[2] The district court dismissed the action on the grounds that § 210 did not authorize the recovery of overcharges by indirect purchasers and that any such claims were time-barred. Petition Appx. at 5a-14a.

A. Statutory and Regulatory Background.

Domestic crude oil price and allocation controls were promulgated in the early 1970's pursuant to the ESA. The ESA expired by its own terms in 1974,[3] but portions of it were incorporated by reference into the Emergency Petroleum Allocation Act ("EPAA").[4] The controls were terminated by President Reagan in January 1981. The EPAA expired September 30, 1981, subject to a savings clause. Under § 211 of the ESA, as incorporated in the EPAA, appeals from the district courts of rulings on ESA issues were within the exclusive jurisdiction of the Temporary Emergency Court of Appeals ("TECA"), and are now within

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[2] Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743 (1971), last codified following 12 U.S.C. § 1904 note (1980).

[3] Economic Stabilization Act Amendments of 1973, Pub.L. No. 93-28, 87 Stat. 27 (1973).

[4] Pub.L. No. 93-159, 87 Stat. 628 (1973), codified as amended, but omitted, at 15 U.S.C. §§ 751-760.

the exclusive jurisdiction of the Federal Circuit.[5] The provision for exclusive appellate jurisdiction was intended "'to funnel into one court all appeals arising out of the District Courts and thus gain in consistency of decision.'" *Texas American Oil Corp. v. U.S. Department of Energy*, 44 F.3d 1557, 1562 (Fed.Cir. 1995), quoting S. Rep. No. 92-507, 92nd Cong., 1st Sess. 10, *reprinted* in 1971 U.S.C.C.A.N. 2283, 2292.

The statutory and administrative history of the ESA, the EPAA, TECA, and the administrative bodies responsible for enforcing the ESA and EPAA, was reviewed in 1996 by the Federal Circuit in *Phoenix Petroleum Co. v. U.S. F.E.R.C.*, 95 F.3d 1555, 1559-1563 (Fed.Cir. 1996).

During the time relevant to this proceeding, the regulations generally permitted different prices to be charged by crude oil producers depending upon the category or classification of the oil being sold, *e.g.*, "old" oil, "new" oil or "exempt" oil. Each domestic producer was required to certify the category of crude oil upon its first sale to a purchaser and provide such certification or a recertification within the two month period immediately following the month in which the sale was made. Former 10 C.F.R. § 212.131 (1980). Integrated petroleum companies, like Chevron, that generally did not sell their crude oil production to third parties but transferred it to their own refineries, nonetheless had to certify the category of oil transferred and report a "sale."

B. The Tertiary Incentive Program.

The Tertiary Incentive Program ("TIP") was a DOE program intended to encourage development of tertiary-enhanced crude oil projects. *Union Oil Co. of Cal. v. U.S.*

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[5] So provided in the Public Courts Administration Act of 1992, Pub.L. 102-572, § 102, 106 Stat. at 4506 (1992). Concurrently, 28 U.S.C. § 1295(a) was amended to add to the Federal Circuit's jurisdiction appeals under § 211 of the ESA and under § 5 of the EPAA.

Dept. of Energy, 688 F.2d 797, 800 (Temp.Emer.Ct.App. 1982). The TIP permitted a producer to recoup a portion of the expenses it had paid and reported in connection with a tertiary-enhanced recovery project. Former 10 C.F.R. 212.78(c) (1980). The recoupable portion of the expenses was known as "recoupable allowed expenses." *Ibid.*

The mechanism for recouping recoupable allowed expenses was that certain quantities of crude oil otherwise subject to price controls could be certified as released from controls and sold at exempt or market prices, provided that the "tertiary incentive revenue" from such sales did not exceed the recoupable allowed expenses attributable to that producer. Former 10 C.F.R. § 212.78(a)(2), 44 F.R. 51148 (1979). "Tertiary incentive revenue" meant in the case of first sales of crude oil the difference between the market-clearing price and the otherwise applicable ceiling price, less any *ad valorem* severance or windfall profit tax attributable to the excess. *Id.* at § 212.78(c). Under the regulations, the crude oil could be certified (or recertified) as exempt under the TIP within the two-month period following the month in which the oil was sold. 46 F.R. 12945, 12947 (Feb. 19, 1981); Former 10 C.F.R. § 212.78(c) (1980).

Integrated petroleum companies that did not sell crude oil to third parties but transferred it to their own refineries, did not receive money or benefit under the TIP except through an interrelated DOE program known as the Entitlements Program. *See* 49 F.R. 27410, 27416 (July 3, 1984).

C. The Entitlements Program.

The Entitlements Program was established to equalize among domestic refiners the benefits of access to lower-priced domestic crude oil. 39 F.R. 42246 (Dec. 4, 1974). An "entitlement" constituted the right to refine one barrel of price-controlled crude oil. Each refiner was allocated a number of entitlements equal to the number of barrels it refined ("runs to stills") multiplied by the percentage of price-controlled crude oil in the national crude-oil supply. Refiners that refined a disproportionately large share of

price-controlled crude oil were required to buy entitlements from refiners that refined a disproportionately small share in that month. Former 10 C.F.R. § 211.67(a)(1) (1980). Each month, the DOE assigned to refiners the obligations to buy or sell, and set the price of the entitlements, through a monthly list (the "Entitlements Notice") published during the *second month after* the transactions on which the computations were based.[6]

While the Entitlements Program operated, it was the mechanism for providing Tertiary Incentive benefits to integrated petroleum companies like Chevron that did not sell crude oil but transferred it to their own refineries. For such companies, the certification or recertification of crude oil under the TIP reduced the number of entitlements needed by the company's refining arm, thus increasing the number of entitlements the company could sell or reducing the number it needed to buy. However, in this case, following termination of price controls on January 28, 1981, DOE never published an Entitlements Notice for the month of January 1981 and no obligations to buy entitlements were imposed on any refiners with respect to crude oil that was refined in 1981. *Texaco Inc. v. Department of Energy*, 795 F.2d 1021 (Temp.Emer.Ct.App.).[7]

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[6] Contrary to the implications in the petition, the Entitlements Program, even when it operated fully, was not capable of passing on one refiner's costs in a given month to other refiners in the same month. There was always a "two-month lag," until the Entitlements Notice was issued.

[7] The petition repeatedly asserts that the Entitlements Program passed on to all refiners the increased cost of the crude oil that Chevron had delivered to its refineries in January 1981 and had subsequently recertified as exempt under the TIP. But because the DOE issued no Entitlements Notice for any period after December 31, 1980, no increases in crude oil costs related to Chevron's 1981 TIP recertifications were passed on to anyone by the Entitlements Program.

D. The Proposed Remedial Order Proceeding.

Chevron participated in the TIP in 1980 and 1981. Court of Appeals Appendix in 01-1565 ("Appx. 01-1565") at 24. After the end of price controls, Chevron recertified as exempt under the TIP a quantity of crude oil that had been delivered to Chevron's own refineries in January 1981. *Id.* at 25. As authorized by the TIP, the recertifications of the January 1981 oil were based on expenses incurred by Chevron for tertiary projects in February and March 1981, inventory purchased in February and March 1981 and windfall profit and state severance taxes attributable to the recertifications. Appx. 01-1565 at 25, 27 and 29.

Subsequently, in 1988, Chevron made available for non-tertiary use some of the prepaid goods and services on which the TIP recertifications were based. Chevron also recovered certain windfall profit taxes in a 1990 settlement with the Internal Revenue Service and received certain refunds of state severance taxes. *Id.* at 27, 29. Based on these events, in 1992, the DOE issued a proposed remedial order to Chevron alleging that Chevron had received excess revenue as a result of its participation in the TIP and that it should be required to disgorge that excess revenue, with interest. *See Chevron U.S.A. Inc.*, 25 DOE (CCH) ¶ 82,506 (1996). Petitioners, except for Westvaco Corporation, through their present counsel, participated formally in the DOE proceeding. Appx. 01-1565 at 104-108.

Contrary to the claim in the petition that DOE "abandoned" the proposed remedial order proceeding, Petition at 10, the DOE's Office of Hearings and Appeals ("OHA") held an evidentiary hearing, limited to the factual issue whether Chevron had received excessive revenue under the TIP. *Chevron U.S.A. Inc, supra,* 25 DOE (CCH) ¶ 82,506 at 85,016. Following that hearing, OHA ordered the proposed remedial order dismissed on the ground that the ERA "failed to establish the existence of a substantive violation requiring restitution on the part of Chevron." *Id.* at 85,018. Specifically, the OHA concluded:

--"[A]s a result of the termination of price controls and the non-issuance of the January [1981] Entitlements Notice, the incremental crude oil value reflected in [Chevron's] 1981 TIP recertifications was not passed on through [Chevron's] own prices or through other refiners by operation of the Entitlements Program." *Id.* at 85,028, footnote omitted.

--"[W]e find no 'unjust enrichment' or 'ill-gotten gains' on the part of Chevron. Moreover, since we find that there was no regulatory violation, there are no victims to be made whole in order to restore the *status quo ante*." *Id.* at 85,030.

--"Chevron was not unjustly enriched since the firm did not actually receive revenue in excess of its recoupable allowed expenses under TIP, and there was no injury to third parties as a result of the termination of price controls." *Id.* at 85,033.[8]

Several entities, including petitioners other than Westvaco, who hoped to share in any recovery by the DOE in its enforcement proceeding, then brought lawsuits challenging the decision not to issue a remedial order to Chevron. Those lawsuits resulted in rulings that the

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[8] In light of the termination of price controls and the non-issuance of the January 1981 Entitlements Notice, referenced in the OHA decision, the suggestion in the petition that the OHA has found in other cases that refined product purchasers such as petitioners paid to the refiners from whom they purchased oil products increases in the acquisition cost of crude oil by *any* refiner (*e.g.*, Petition at 6-7, 17) is simply irrelevant here, as well as incorrect. Those determinations concerned the pass-on of costs through the Entitlements Program. The Entitlements Program indisputably did not operate in this case. Conclusions in other cases as to pass-on of costs while the Entitlements Program was fully operating are not transferable to this case.

complaining entities did not have a right to judicial review of the DOE's determination not to issue a remedial order.[9]

E. The Proceedings Below.

Petitioners filed this action March 25, 1998 on behalf of themselves and other purchasers of oil products from refiners participating in the Entitlements Program who had asserted crude oil refunds in previous proceedings before the DOE. Appx. 01-1565 at 20. In the complaint, petitioners claim to have purchased oil products in January 1981 from "United States refiners." Appx. 01-1565 at 18-20, 29, ¶¶ 4-11, 37. There is no allegation that any petitioner purchased crude oil or any other product from Chevron. The complaint, which is largely drawn from the allegations in the DOE's proposed remedial order, recites that during January 1981 Chevron produced and refined a large quantity of crude oil that Chevron recertified as market-price crude oil under the TIP. Appx. 01-1565 at 24-25, ¶¶ 23, 24. As authorized by the TIP, Chevron's recertifications were based on expenses incurred and inventory purchased in February and March 1981. *Id.* at 25, ¶ 23. The complaint alleges that Chevron subsequently recovered some of the expenses that had been the basis for its TIP recertifications, and certain windfall profit tax and state severance tax refunds.

The complaint alleges that during January 1981 refiners generally, including Chevron, "correctly anticipated" their crude oil costs for that month "as they would be determined after implementation of the Entitlements Program two months subsequently, and specifically as they would be increased by virtue of implementation of TIP programs by

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[9] *See Consolidated Edison Co. of New York v. O'Leary,* 131 F.3d 1475 (Fed.Cir. 1997); *In re The Department of Energy Stripper Well Litigation,* 217 F.3d 851 (Fed.Cir. 1999) (dismissing appeals from the District Court for the District of Kansas); *In re The Department of Energy Stripper Well Exemption Litigation,* 206 F.3d 1345 (10th Cir. 2000) (dismissing appeals from the District Court for the District of Kansas and denying motions for transfer), *certiorari denied,* 531 U.S. 924 (2000).

refiners through March 1981," Appx. 01-1565 at 25-25, ¶¶ 25, 26, and that accordingly the recertification revenues reflected in Chevron's refining runs were the basis for the market prices for refined products sold in January 1981 by the refining industry, including Chevron, and were paid by end users of oil products. *Ibid.*[10]

Petitioners contend that they were overcharged for refined oil products purchased in January 1981

> to the extent to which such payments by them reflected an increase in the price of crude oil to refiners on the basis of anticipated payments of Windfall Profits Taxes and Severance Taxes by Chevron by virtue of the TIP recertification by Chevron as to crude oil refined by it in January 1981 which were later recovered by Chevron from the United States and the States.

Appx. 01-1565 at 29, ¶ 37.

The damages sought in the complaint are not related to prices that may have been paid by petitioners or ceiling prices. Rather, the complaint seeks a judgment awarding to petitioners a percentage share of the tax refunds or credits realized by Chevron in its 1990 windfall profit tax settlement with the United States and in severance tax settlements with various states, trebled under ESA § 210(b). *Id.* at 30, ¶¶ 39-40.

Chevron moved to dismiss the complaint based on TECA precedents holding that plaintiffs asserting claims under § 210 of the ESA must be direct purchasers of the petroleum products on which the overcharges were made, that the complaint failed to state a claim and that the action was

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[10] If any refiner actually "anticipated" increased future crude oil costs upon implementation in March 1981 of the January 1981 Entitlements Notice, such refiner's expectations were not met since, as noted, the January 1981 Entitlements Notice was never issued.

barred by the applicable statute of limitations. The district court dismissed the action, ruling that petitioners were without standing and that the action was barred by the statute of limitations (citing *Bond v. Texaco*, 647 F.Supp. 1135 (D.D.C 1986). The court noted that it "need not address" whether the complaint failed to state a claim. Petition Appx. at 6a n.2. The Federal Circuit affirmed in a per curiam order without opinion, designated as not to be cited as precedent. Petition Appx. 1a. Though Federal Circuit Rule 47.6(c) provides for the filing of requests to make an order precedential, petitioners filed no such request.[11]

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE FEDERAL CIRCUIT WAS NOT REQUIRED TO WRITE AN OPINION CITABLE AS PRECEDENT IN AFFIRMING THE DISTRICT COURT.

Petitioners' assertion that the Federal Circuit's affirmance of the district court without opinion was used to avoid facing issues of first impression does not justify this Court's review. The circuit court's decision is expressly based on Federal Circuit Rule 36, set out at page 1a of the Appendix hereto, which permits a judgment of affirmance without opinion where the court has determined that an opinion would have no precedential value and has determined either that the record supports judgment on the pleadings or that the judgment was entered without error of law. Simply because the Federal Circuit did not think this case merited a written opinion is not a reason for review by this Court.

Nor is review warranted because the court designated its decision as not to be cited as precedent. Petitioners argue that the not-to-be-cited designation "impinges on the right to

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[11] Federal Circuit Rule 47.6 is set out in the Appendix hereto, page 2a.

appeal." Petition at 24. Petitioners nonetheless did not request, as they could have under Federal Circuit Rule 47.6, that the decision be made precedential.

A. Standing.

As to standing, the case below presented no issue of first impression.

Petitioners acknowledge the § 210 "requirement that a private cause of action is available only 'against any person renting property or selling goods or services who is found to have overcharged the plaintiff.'" Petition at 15. In *Gulf Oil Corp. v. Dyke,* 734 F.2d 797, 807-808 (Temp.Emer.Ct.App. 1984), TECA specifically held that ESA § 210 does not authorize recovery of overcharges by indirect purchasers. TECA also held, specifically in connection with that ruling, that it would not expand the scope of § 210 after the statute's expiration, while exercising jurisdiction under the savings clause:

> When Congress created the Temporary Emergency Court of Appeals as a "court of special and limited jurisdiction" which should "strictly construe [its] statutory grants of jurisdiction," it did not authorize recovery of overcharges by indirect purchasers. The EPAA expired by its own terms in September, 1981. *We will not expand the statute while exercising our jurisdiction under the savings clause.*

734 F.2d at 807-808, emphasis added, footnote omitted. Likewise, in *Stertz v. Gulf Oil Corp.,* 783 F.2d 1064 (Temp.Emer.Ct.App. 1986), a case involving crude oil overcharges, TECA pointed out without any qualification or limitation that "[o]nly direct purchasers have standing to sue under section 210." 783 F.2d at 1066 n.2.

The Federal Circuit, en banc, in *Texas American Oil Corp. v. U. S. Department of Energy,* 44 F.3d 1557, 1561 (Fed.Cir. 1995), adopted the body of law represented by TECA precedents.

Far from deciding an issue of first impression, the Federal Circuit simply followed TECA's refusal to expand the scope of § 210, more than 20 years after the statute expired.[12]

None of petitioners' arguments for not applying TECA's prior holdings in this case required the Federal Circuit to address the point in a written opinion.

Petitioners have now abandoned one of the standing arguments they asserted below, that the Entitlements Program made every United States refiner the "agent" of any producer-refiner whose crude oil costs reflected TIP-increased prices, so that a purchase from *any* refiner was a purchase from Chevron. Appx. 01-1565 at 17, 23. This theory, as the district court noted, has no factual basis or legal authority and is inconsistent with the position petitioners took before Judge Jackson in an earlier case, in which petitioners admitted that they were indirect purchasers. Petition Appx. at 10a, 9a. The argument did not require a written opinion of the circuit court.

Petitioners' principal arguments on standing were (and are) based on disregarding the fact that when the transactions at issue occurred, the DOE Entitlements Program was not operating to spread among refiners crude oil costs reported

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[12] Consistent with TECA's holdings, many other courts have also recognized that only direct purchasers may sue under § 210. *See, e.g., Atlantic Richfield Co. v. United States Dept. of Energy,* 618 F.Supp. 1199, 1212 (D.Del. 1985) (noting that in private enforcement action under § 210 "only a direct purchaser has standing to sue for violations of the regulatory provisions"); *State of Minnesota v. Standard Oil Co. (Indiana),* 568 F.Supp. 556, 566-567 (D.Minn. 1983) (dismissing all claims under § 210 by the State of Minnesota as indirect purchaser and recognizing that "§ 210(b) remains the exclusive remedy for overcharges. . . . Furthermore, . . . § 210(b) does not allow actions for indirect overcharges"); *Florida Power & Light Co. v. Belcher Oil Co.,* 82 F.R.D. 78, 80 (S.D. Fla. 1979) holding as to § 210 that "[t]here is no indication that suits were contemplated by anyone other than the immediate buyer against the immediate seller").

by Chevron as producer-refiner. *See, e.g.*, Petition at 6-7, 17-18, 21, 25-26. Thus, petitioners' argument that the Entitlements Program was the "functional equivalent" of a pre-existing "cost-plus" contract, so that the direct-purchaser rule should not apply, is completely destroyed by the fact that, as a result of the termination of price controls and the non-issuance of the January 1981 Entitlements Notice, no cost increases in any refiner's 1981 crude oil costs were passed on by the Entitlements Program. As a matter of law, and as the Federal Circuit was fully aware, the Entitlements Program ended without any entitlements obligations being issued for any period after December 31, 1980. Petitioners' bare allegation that the Entitlements Program was the "functional equivalent" of a cost plus contract did not, in the circumstances here, create an issue of first impression.[13]

The petition does not even mention petitioners' argument below that the refining industry had correctly "anticipated" crude oil costs for January 1981, as they would be determined after implementation of the Entitlements Program two months subsequently, and as they would be increased by implementation of TIP programs by refiners through March 1981. *See* Appx. 01-1565 at 25-26, ¶¶ 25, 26. This argument would shift the focus from the existence *vel non* of an overcharge as defined in § 210 (a charge in excess of a ceiling price) to the state of mind in January 1981 of each refiner in the country in settling prices for a multitude of refined products. While petitioner's argument

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[13] Even when the Entitlements Program fully operated, it was never the "functional equivalent" of a cost-plus contract, because refiners were not required to pass on increased crude oil costs in product prices. Former 10 C.F.R § 212.83(c)(e) (1980). Accordingly, the impact of cost increases was never "capable of determination in advance." *See Gulf Oil Corp. v. Dyke, supra,* 734 F.2d at 809, cited in the Petition at pages 25-26.

may be unique, it raises no issue of first impression in light of TECA's prior holdings.

Finally, petitioners' contention that exercise of this Court's supervisory powers is called for because the Court of Appeals did not honor "language," *i.e.*, dicta, of previous decisions, Petition at (i), 26-27, is also meritless. Petitioners, utilities and manufacturers, insist that TECA and the Federal Circuit found that "essentially the same Utilities and Manufacturers" were provided a remedy under ESA § 210 pursuant to which they could sue Chevron directly in a private cause of action.[14] In the cases relied upon, TECA and the Federal Circuit held no more than that bringing of enforcement actions under § 209 is the exclusive right of government, *Consolidated Edison*, 131 F.3d at 1479, that § 210 is the exclusive remedy for private litigants, *Consolidated Edison*, 117 F.3d at 544, and that government enforcement actions under § 209 are separate and distinct from actions of private entities under § 210 and private entities have no interest in public enforcement actions under § 209, *Getty*, 865 F.2d at 275-276. None of the cases relied upon presents an issue whether indirect purchasers may sue under § 210, which is the issue here.

B. Borrowing of the Most Analogous State Law Statute of Limitations.

The fact that the circuit court did not write an opinion on the statute of limitations issue likewise fails to justify review. TECA has repeatedly held that in actions brought under ESA § 210 the federal courts will apply the most analogous state law statute of limitations. *Ashland Oil Co. of California v. Union Oil Co. of California*, 567 F.2d 984 (Temp. Emer.Ct.App. 1977); *Gulf Oil Corporation v. Dyke*, 734 F.2d

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[14] Petition at 26-27, citing *Consolidated Edison Co. of New York v. O'Leary*, 131 F.3d 1475 (Fed.Cir. 1997), *Consolidated Edison Co. of New York v. O'Leary*, 117 F.3d 538 (Fed.Cir. 1997) and *Getty Oil Co. v. Department of Energy*, 865 F.2d 270 (Temp.Emer.Ct.App. 1988).

797, 808 (Temp.Emer.Ct.App. 1984). While TECA did not address whether the federal statute of limitations for suits by the DOE under the Petroleum Overcharge Distribution and Restitution Act ("PODRA"), 15 U.S.C. § 4504, may apply to a § 210 action, federal courts, as the district court pointed out, continued to apply the most analogous state statutes of limitation after PODRA was enacted. Petition Appx. at 11a-12a.

The Federal Circuit was not required to write an opinion addressing whether the PODRA statute of limitations established for actions by the DOE pursuant to ESA § 209 should apply to private actions brought under § 210. While petitioners may be correct that no court decision specifically addresses that issue, TECA and the Federal Circuit had consistently distinguished between § 209 and § 210 actions. *See, e.g., Consolidated Edison,* 131 F.3d at 1479. Congress expressly limited the reach of the PODRA statute of limitation to actions brought "by the Secretary"; petitioners submitted no authority suggesting that Congress intended to alter the rule of borrowing for § 210 actions. The implication in the petition that every argument of counsel must be addressed in an appellate opinion is not supported by authority.

II. THE FEDERAL CIRCUIT'S DECISION CAN HAVE ONLY LIMITED APPLICATION BEYOND THIS CASE.

The petition should also be denied because the Federal Circuit's decision can have only limited application beyond this case. Petitioners' argument that the decision constitutes an "emasculation" of the private cause of action under § 210 is unfounded. The decision does not change the scope of § 210 in any respect and is consistent with TECA's determination 15 years ago not to expand the statute.

As to the statute of limitations, petitioners themselves suggest an intent on the part of Congress, when it enacted PODRA in 1986, to not provide a limitation period for § 210 actions, because it viewed such actions as "unlikely to be

brought" (Petition at 20), five years having then elapsed since deregulation. It has now been over *20 years* since deregulation. Given the consistency of court rulings applying state law statutes of limitations of less than six years to § 210 actions, this Court may presume that those who might have had such claims have already asserted them. In any event, there is no basis for assuming that, nearly a generation after expiration of price controls, the choice of a statute of limitations for private actions under the expired statute can be of great importance.

III. THE FEDERAL CIRCUIT'S DECISION IS CORRECT.

The petition for certiorari should be denied because the Federal Circuit's decision is correct. Petitioners do not contend that TECA's prior holdings that only direct purchasers may sue under § 210 are wrong. They only argue that those holdings should not apply in this case. As we have shown above, there is no plausible basis for any such conclusion because the Entitlements Program, on which petitioners rely, did not operate to spread any possible impact of Chevron's TIP recertifications to any other refiner. There is thus no basis for contending that the direct purchaser rule, which has uniformly been applied in § 210 cases, should be dispensed with because this case involves crude oil.

The suggestion in the petition that petitioners, because they have been awarded distributions from DOE recoveries in § 209 enforcement proceedings, somehow have standing to maintain a private action under § 210, is also without support. The DOE distributes a portion of its crude oil overcharge recoveries from § 209 cases to individual claimants under the so-called "Subpart V" proceedings, *see* 10 C.F.R. § 205. Because of the impossibility of tracing the impact of crude oil overcharges to specific purchasers, DOE distributes the bulk of its crude oil overcharge

recoveries under ESA § 209 to the state and federal governments as "indirect restitution." *Ibid.*[15]

The Federal Circuit is also correct as to the applicable statute of limitations. Petitioners have abandoned the claim, urged below, that the 3-three year statute of limitations had not run.[16] Nor have petitioners challenged the conclusion that the "most analogous" statute of the District of Columbia is at most three years under D.C. Code Ann. § 12-301 (5), (7) and (8). Rather, they now confine their argument to urging that the limitation period specified in 1986 for § 209 enforcement actions brought "by the Secretary" should apply to private actions under § 210. Hence, the fact that courts in earlier cases may have had to choose among several possible statutes is not a basis for review here, where no such issue is presented.

As noted above, petitioners contend that Congress, by not providing a statute of limitations for § 210 actions when it enacted PODRA in 1986, "presumably reflected a view that such actions were unlikely to be brought." Petition at 20. The argument suggests nothing so much as a specific intent by Congress to leave the law unchanged for then remaining § 210 actions.

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[15] The petition mischaracterizes the Report to the Court in *In re The Department of Energy Stripper Well Exemption Litigation*, 653 F.Supp. 108 (D.Kan. 1986), in arguing that it demonstrates that entities such as petitioners in this case paid to refiners from whom they purchased oil products increases in the crude oil costs of *any* refiner (Petition at 6-7). Contrary to the petition, the *Stripper Well* Judge read the Report as concluding that it is "impossible to trace directly the impact of the [*Stripper Well*] overcharges." 653 F. Supp. at 110-111.

[16] Petitioners had intervened in the DOE enforcement proceedings against Chevron in July 1992, demonstrating that there was adequate information available at that time to determine whether there was a basis for litigation. The instant suit was not filed until March 1998.

This Court pointed out in *Lampf, Pleva, Lipkind, Prupius & Petigrow v. Gilbertson*, 501 U.S. 350, 355 (1991), that the practice of borrowing the state law statutes of limitations "has enjoyed sufficient longevity that we may assume that, in enacting remedial legislation, Congress ordinarily 'intends by its silence that we borrow state law.'"

The assumption that Congress, when it enacted PODRA in 1986, intended to continue to borrow state law in § 210 cases is particularly compelling here, where the appellate court vested with exclusive appellate jurisdiction had repeatedly applied the borrowing doctrine in § 210 cases and where Congress was well aware of that history but carefully limited the PODRA statute of limitations to actions "by the Secretary." 15 U.S.C. § 4504(a)(3). Had Congress desired to express a policy that private parties should no longer be subject to state statutes of limitations, it knew how to say so.

Moreover, while *Lampf* permits borrowing from federal law, it is a "closely circumscribed exception" (*Lampf*, 501 U.S. at 356), limited to only those situations where the rule from federal law "clearly provides a closer analogy than available state statutes," *ibid., and* when the federal policies at stake and the practicalities of litigation "make that rule a significantly more appropriate vehicle for interstitial lawmaking," *ibid.* The examples cited in *Lampf* where borrowing from federal law was permitted were situations where operation of a state limitations period would "frustrate the policies embraced by the federal enactment," 501 U.S. at 356, or the state rules were "at odds" with the purpose or operation of federal substantive law. *Ibid.* These conditions are not remotely present here. TECA has consistently held that state statutes of limitation with durations of three years or less are not inconsistent with national energy policy. TECA pointed out 18 years ago in *Gulf Oil Co. v. Dyke, supra*, 734 F.2d 797, that it had already held that "[a] *two-year* statute is certainly not inconsistent with national energy policy seeking to wind up regulation of the oil industry—'temporary' *ab initio*." 734 F.2d 808, quoting *Johnson Oil*

Co. v. DOE, 690 F.2d 191, 196 (Temp.Emer.Ct.App. 1982), emphasis added.

In arguing that the PODRA 6-year statute is a "closer fit" with § 210 actions than state law, petitioners ignore the overwhelming body of law emphasizing the separate statutory remedies under § 209 and § 210. In this connection, petitioners' claim that upon the end of price controls § 209 actions were converted to damage actions seeking the same damages as would be sought in a § 210 action (Petition at 19-20) is grossly mistaken. In enforcement cases under § 209, the government primarily seeks disgorgement, whether or not there is proof of injury to particular parties. The en banc decision in *Texas American Oil Corporation v. United States Department of Energy, supra,* 44 F.3d .2d at 1569, says it all: the acknowledged public purpose of § 209 prosecutions "is to remedy unjust enrichment of the wrongdoer, not to 'make whole' those persons who were overcharged." Because it is not possible to identify the extent of any individual injury, PODRA authorizes payment to the public treasuries--state and federal--of the bulk of disgorgement recoveries. Thus "the DOE is charged with enforcing 'public, not private rights, *Texas American* at 1571. The portion of § 209 recoveries that that are set aside to pay individual claims are not distributed based on findings that individual parties sustained particular damages but are distributed under DOE-administered "Subpart V" proceedings, based on presumptions originally designed to ease the burden on an applicant claiming to have been injured. *See Goodyear Tire & Rubber Co. v. Department of Energy,* 118 F.3d 1531, 1537 (Fed.Cir. 1997). Section 210 plaintiffs, by contrast, are seeking to enforce private rights. Their claims under § 210 require proof of individual injury.

Moreover, Congress's provision in PODRA of a statute of limitations for § 209 actions "by the Secretary" was unrelated to any consideration relevant to a § 210 action. The legislative history of 15 U.S.C. § 4504 established that Congress was concerned with bringing down the curtain on agency enforcement actions. The legislation was neither

directed at nor concerned with private actions. At the time the legislation was enacted, there was a backlog of agency cases and Congress was concerned that "long after the termination of controls, there are many cases still in the prelitigation stage." *See* H. Rep. No. 99-727, 99th Cong., 2d Sess. (1986) *reprinted* in 1986 U.S.C.C.A.N. 3607, 3879. The legislative history demonstrates that there were a number of factors that had contributed to delay in the prosecution of agency cases, including lack of adequate resources at the Department of Energy. *Id.* In adopting a statute of limitations for the first time for government enforcement actions Congress had to take into account the ability of the DOE to move forward on all of its cases. *Id.* There is accordingly no basis for an argument that Congress intended to change the law applicable to § 210 actions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Federal Circuit Rule 36

Rule 36. Entry of Judgment - Judgment of Affirmance Without Opinion

The court may enter a judgment of affirmance without opinion citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value:

(a) the judgment decision, or order of the trial court appealed from is based on findings that are not clearly erroneous;

(b) the evidence supporting the jury's verdict is sufficient;

(c) the record supports summary judgment, directed verdict, or judgment on the pleadings;

(d) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or

(e) a judgment or decision has been entered without an error of law.

Federal Circuit Rule 47.6

Rule 47.6. Opinion and Order of the Court

(a) **Disposition of Appeal, Motion, or Petition; Precedential Effect.** Disposition of an appeal may be announced in an opinion; disposition of a motion or petition may be announced in an order. An appeal may also be disposed of in a judgment of affirmance without opinion pursuant to Federal Circuit Rule 36. A disposition may be cited as precedent of the court unless it is issued bearing a legend specifically stating that the deposition may not be cited as precedent.

(b) **Nonprecedential Opinion or Order.** An opinion or order which is designated as not to be cited as precedent is one unanimously determined by the panel issuing it as not adding significantly to the body of law. Any opinion or order so designated must not be employed or cited as precedent. This rule does not preclude assertion of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of the court designated as nonprecedential.

(c) **Request to Make an Opinion or Order Precedential; Time for Filing.** Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential. An original and 6 copies of the request must be filed with the court. The request will be considered by the panel that rendered the disposition. The requestor must notify the court and the parties of any case that person knows to be pending that would be determined or affected by reissuance as precedential. Parties to pending cases who have a stake in the outcome of a decision to make precedential must be given an opportunity to respond. If the request is granted, the opinion or order may be revised as appropriate.

(d) **Public Records.** All dispositions by the court in any form will be in writing and are public records.